

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

**REPLY COMMENTS OF  
EL PASO NETWORKS, LLC,  
FPL FIBERNET, LLC, AND  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

El Paso Networks, LLC (“El Paso”), FPL FiberNet, LLC (“FiberNet”), and McLeodUSA Telecommunications Services, Inc. (“McLeodUSA” and together with El Paso and FiberNet, collectively, “Commenters”), by their undersigned attorneys, file these reply comments on the petitions for reconsideration filed by Nextel Communications, Inc. (“Nextel”), T-Mobile USA, Inc. (“T-Mobile”), the Cellular Telecommunications and Internet Association (“CTIA”), and AT&T Wireless Services, Inc. (“AWS” and together with Nextel, T-Mobile and CTIA, collectively “Petitioners”), requesting that the Commission reconsider its definition of loop and allow unbundled access to ILEC facilities deployed to commercial mobile radio service (“CMRS”) carrier cell sites as UNE loops.<sup>1</sup>

---

<sup>1</sup> See Petition for Reconsideration of Nextel., dated October 2, 2003 (the “Nextel Petition”), Petition for Reconsideration of T-Mobile, dated October 2, 2003 (the “T-Mobile Petition”), Petition for

In the initial round of comments, Commenters filed comments in support of Petitioners' petitions.<sup>2</sup> BellSouth Corporation ("BellSouth"), Qwest Communications International ("Qwest"), SBC Communications Inc. ("SBC") and Verizon Telephone Companies ("Verizon" and together with BellSouth, Qwest and SBC, collectively "Opposing ILECs") opposed Petitioners' petition.<sup>3</sup> Among other things, the Opposing ILECs argue that the link between the ILEC central office and a CMRS carrier's cell site is not a UNE because (i) such link is neither dedicated transport nor a local loop; (ii) CMRS carriers previously had not argued that such link was a loop; and (iii) CMRS providers are not impaired without access to such facilities.

In response to the Opposing ILECs' comments, Commenters offer these reply comments and urge the Commission to reconsider the Triennial Review Order<sup>4</sup>, to accord UNE status to the loops connecting wireless carrier cell sites to ILEC central offices.

## **I. THE LINK BETWEEN AN ILEC CENTRAL OFFICE AND A CMRS CARRIER SHOULD BE ACCORDED UNE STATUS**

### **A. Facilities to CMRS Sites are Clearly within the ILECs Network**

The Opposing ILECs contend that CMRS providers should not be entitled to UNE loops because these facilities are "outside" of the ILECs' network.<sup>5</sup>

---

Reconsideration or Clarification of CTIA, dated October 2, 2003 (the "CTIA Petition") and Petition for Clarification of Reconsideration of AWS (the "AWS Petition").

<sup>2</sup> See Support Comments of El Paso, FiberNet and McLeodUSA, dated November 6, 2003 (the "Support Comments").

<sup>3</sup> See Opposition and Comments of BellSouth, dated November 6, 2003 (the "BellSouth Comments"), Opposition of Qwest, dated November 6, 2003 (the "Qwest Comments"), Comments of SBC on Petitions for Reconsideration, dated November 6, 2003 (the "SBC Comments") and Response of Verizon to Petitions for Reconsideration, dated November 6, 2003 (the "Verizon Comments").

<sup>4</sup> See *Revision of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. August 21, 2003) (the "Triennial Review Order").

However, as the Commenters noted, loop facilities are also “outside” the ILEC’s networks. In the Triennial Review Order, the Commission excluded entrance facilities from the definition of transport because the cost to deploy such facilities (even when obtained from the ILEC via tariff) are controlled by the CLEC. However, as the Commenters noted, CMRS carriers do not have the ability to locate all cell sites in close proximity to the ILEC network to minimize the cost of connecting the cell site to the central office. Rather, concerns such as customer locations and network coverage control where the CMRS carrier places its antennas. Thus, even though facilities connecting cell sites to ILEC end offices may be “outside” the ILEC network, they are functionally, technically and physically identical to other such elements outside the ILEC network like loops.

**B. There are no Technical Differences in the Circuits Delivered to Cell Sites and other Circuits within the ILEC’s network**

In their submissions the Opposing ILECs fail to demonstrate the technical differences to distinguish circuits to cell sites from circuits to other locations within their networks, and even admit that they are “similar in some respects to loops”.<sup>6</sup>

As noted by Commenters, there is no technical difference between a circuit that serves a cell site and a circuit that serves a residence or business location within the ILEC’s network. The technical specifications of the interface in a circuit delivered to a cell site are no different or to any other point in the network where the ILEC deploys facilities from a central office to an address that is not another central office.<sup>7</sup>

---

<sup>5</sup> BellSouth Comments at 19, Qwest Comments at 6 (stating that “the circuits at issue were often constructed to specification on behalf of the CMRS providers and generally to locations other than the ILEC central office”).

<sup>6</sup> SBC Comments at 18.

<sup>7</sup> Support Comments at 7-8.

The Opposing ILECs objections to allowing unbundled access to these circuits are unsupported from a technical or legal perspective. The Opposing ILECs' arguments are simply based on their economic interest to relegate CMRS providers to continue paying higher special access rates for these facilities, while at the same time thwarting competition by eliminating competitive CLECs ability to provide facilities to these customers at more competitive prices.

Rather than excluding facilities that serve CMRS providers from the ILECs' unbundling obligations, the Commission should clarify the definition of UNE loops to explicitly encompass such service. By adding these clarifications to its UNE loop definition, the Commission would advance the pro-competitive goals of the Act by ensuring that ILECs cannot impede CLECs' ability to provide wholesale telecommunications services to CMRS and other carrier customers.

**C. CLECS Providing Services to CMRS Carriers' Cell Sites Should be Entitled to UNE Loops to these Locations**

Verizon argues that the link between the ILEC central office and CMRS carriers is not a loop because the CMRS carrier is not an end-user.<sup>8</sup>

Commenters disagree with these characterization because (i) the Commission has clearly determined that CMRS carriers are clearly entitled to access to UNEs;<sup>9</sup> (ii) the facilities deployed to CMRS cell sites are network elements within the definition of the

---

<sup>8</sup> Verizon Comments at 34.

<sup>9</sup> Triennial Review Order at ¶ 140.

Act;<sup>10</sup> and (iii) services provided to CMRS providers are qualifying services within the meaning of the Triennial Review Order.<sup>11</sup>

Moreover, the Commission's rules should not be read so narrowly to preclude the use of UNE loops to provide *wholesale* service to carriers simply because they do not meet Verizon's threshold for a retail "end-user." This distinction makes little sense in the case of CMRS carrier cell sites where the end of the wired portion of the CMRS network is at the cell site. Both legally and technically, the central office-cell site circuit is the "last mile" of the wireline network. For the wholesale CLEC, the cell site is the customer premise. Accordingly, the central office to cell site circuit is the loop, and like every other loop should be available as a UNE.

The Commission should now in reconsideration amend the definition of UNE loop to clarify that these circuits should be available as UNEs when requesting CLECs sell on a wholesale basis to CMRS carriers.

## **II. THE TRIENNIAL REVIEW RECORD SHOWS THAT FACILITIES TO CMRS CARRIER CELL SITES SHOULD BE TREATED AS UNE LOOPS**

The Opposing ILECs contend that CMRS providers have historically argued that the facilities between their cell sites and the ILEC's central office should be considered UNE transport and that CMRS carriers should be granted access to such facilities as dedicated transport. In the Triennial Review Order the Commission concluded that "CMRS carriers are ineligible for dedicated transport from their base stations to the

---

<sup>10</sup> Section 153(29) of the 1996 Act, 47 U.S.C. § 153(29), defines "network element" as "a facility or equipment used in the provision of telecommunications service." ILEC copper, fiber and equipment connecting a central office to a cellular tower site, or a MTSO are certainly facilities, and are plainly "used in the provision of a telecommunications service."

<sup>11</sup> Support Comments at 6-7.

incumbent ILEC network”<sup>12</sup> The Opposing ILECs claim that faced with this decision, the CMRS providers are now characterizing these facilities as a loop and that such carriers had never argued for the Commission to define this link as a loop.<sup>13</sup>

The record in the Triennial Review is clear that these facilities should be classified as loops. CLECs such as El Paso filed comments and *ex parte* presentations regarding the application of the Commission’s unbundling rules to ILEC facilities serving CMRS carrier cell sites.<sup>14</sup> In these filings, El Paso noted that ILEC facilities providing access to cell sites and CMRS providers’ switches clearly meet the definition of “network element,” and that these facilities are functionally and technically identical to high-capacity loops and, as such, should be afforded UNE status.<sup>15</sup>

To date, the Commission has ignored these filings and failed to consider the arguments raised in those comments. Thus, the Triennial Review Order remained silent on whether ILEC facilities deployed to CMRS carrier cell sites are available as UNE loops. The Commission should reject the Opposing ILECs comments that these arguments had not been raised before in this proceeding and in reconsideration should now find that there is no technical difference between these facilities and any other loops deployed by ILECs. Accordingly, the Commission should reconsider its definition of loop as requested in the Support Comments and afford unbundled access to such facilities.

---

<sup>12</sup> Triennial Review Order at ¶ 368.

<sup>13</sup> See Qwest Comments at 4, Bell South Comments at 16 and Verizon Comments at 30.

<sup>14</sup> See e.g., Letter from Stephen Crawford, El Paso, to Marlene Dortch, Secretary, Federal Communications Commission, dated November 26, 2002, CC Docket Nos. 01-338, 96-98, 98-147 (“El Paso November 26 Letter”) and Letter from Patrick Donovan and Joshua Bobeck, Counsel for El Paso, to Marlene Dortch, Secretary, Federal Communications Commission, dated December 20, 2002, CC Docket Nos. 01-338, 96-98, 98-147 (“El Paso December 20 Letter”).

<sup>15</sup> El Paso November 26 Letter at 2 and El Paso December 20 Letter at 5-6.

### **III. CLECS ARE IMPAIRED IN PROVIDING SERVICE REGARDLESS OF THE COMMISSION'S FINDING REGARDING CMRS CARRIERS**

The Opposing ILECs claim that CMRS providers make millions of dollars of revenues and would not be impaired by continuing to pay higher special access rates for the facilities to their cell sites.<sup>16</sup> However, the Opposing ILECs fail to address that there are virtually no alternatives to their ubiquitous networks for access services and that other competitors, such as CLECs, would be impaired without unbundled access to such facilities, regardless of the finding with respect to CMRS carriers. Likewise, the Opposing ILECs ignore the Commission's impairment analysis that explicitly excludes considering ILEC special access services as a substitute for UNEs.

As previously noted by Commenters,<sup>17</sup> regardless of whether CMRS carriers are impaired, wholesale CLECs are impaired without unbundled access to facilities to their customers' premises. There is virtually no alternative to the ILECs ubiquitous network and given specific characteristics of loops to cell sites (including the number and length of such circuits) self-deployment is not economically feasible either for the CMRS providers or for facilities-based CLECs seeking to provide a competitive alternative to the ILECs high rates for these facilities.

Contrary to SBC's allegations, CMRS carriers currently have no alternative to connect their cell sites to their MTSOs other than paying ILECs high special access rates.<sup>18</sup> CLEC providers should not be penalized by the Commission simply because their CMRS customers have implemented a successful business model and are profitable companies.

---

<sup>16</sup> See BellSouth comments at 6-11 and Verizon comments at 31.

<sup>17</sup> Support Comments at 13.

Facilities-based CLECs can offer the CMRS carriers a cost effective alternative option if given the opportunity to utilize the existing loop facilities to a cell site as a UNE. This will allow the CLEC to provide the kind of competition that will permit CMRS wireless carriers to avoid ILEC's high-cost choice in procuring loop facilities. This will occur only if these carriers are permitted to compete. The Commission should not put competition on hold for these facilities by permitting ILECs to avoid their unbundling obligations.

Moreover, the FCC has repeatedly ruled that the availability of ILEC special access services under tariff does not factor into the impairment analysis for UNEs.<sup>18</sup> The Commission cannot deny impairment simply because the CMRS carriers have made money while using ILEC special access services. Rather the Commission must look, as it stated in the Triennial review Order to actual evidence of deployment. The ILECs have not presented any evidence of actual marketplace deployment of alternative loops to cell sites. This make sense, because as the comments have explained, there are significant barriers to deploying such facilities for anyone other than the ILECs.

Commenters urge the Commission to clarify the definition of UNE loops to explicitly encompass provision of services to CMRS providers' cell cites. The Commission's failure to reconsider this definition would significantly impair CLECs to the detriment of competition.

---

<sup>18</sup> See SBC Comments at 19 (“[T]here is no reason, however, that CMRS carriers can not (sic) self-deploy entrance facilities to their wireless base stations or obtain such facilities from third parties”).

<sup>19</sup> Triennial Review Order at ¶ 102.



#### IV. CONCLUSION

For the foregoing reasons, the Commission should disregard the comments filed by the Opposing ILECs and clarify that CLECs and CMRS providers may gain unbundled access to the link between CMRS cell sites and the ILEC central office.

Respectfully submitted,

/s/ Ulises R. Pin

Richard M. Rindler

Patrick J. Donovan

Joshua M. Bobeck

Ulises R. Pin

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K Street, N.W., Suite 300

Washington, D.C. 20007

Tel: (202) 424-7500

Fax: (202) 424-7645

Counsel for El Paso Networks, LLC, FPL

FiberNet, LLC and McLeodUSA

Telecommunications Services, Inc.

Dated: November 17, 2003

I, Ulises R. Pin, hereby certify that on this 17<sup>th</sup> day of November, 2003, the foregoing Reply Comments of El Paso Networks, LLC, FPL FiberNet, LLC and McLeodUSA Telecommunications Services, Inc., was filed electronically on the Commission's ECFS in accordance with the Commission's rules and copies were served by email on the following:

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Vistrionix, Inc.  
236 Massachusetts Ave., NW., Suite 110  
Washington, DC 20002

Paul Margie  
Spectrum and International Legal Advisor  
Office of Commissioner Michael Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Paul.margie@fcc.gov](mailto:Paul.margie@fcc.gov)

Barry Ohlson  
Legal Advisor for Spectrum  
and International Issues  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Barry.ohlson@fcc.gov](mailto:Barry.ohlson@fcc.gov)

Matthew Brill  
Senior Legal Advisor  
Office of Commissioner Kathleen  
Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Matthew.brill@fcc.gov](mailto:Matthew.brill@fcc.gov)

Sheryl Wilkerson  
Legal Advisor  
Office of Chairman Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Sherylwilkerson@fcc.gov](mailto:Sherylwilkerson@fcc.gov)

Jennifer Manner  
Senior Counsel  
Office of Commissioner Kathleen  
Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Jennifer.manner@fcc.gov](mailto:Jennifer.manner@fcc.gov)

Samuel Feder  
Legal Advisor on Spectrum and  
International  
Office of Commissioner Kevin Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Samuel.feder@fcc.gov](mailto:Samuel.feder@fcc.gov)

Christopher Libertelli  
Senior Legal Advisor  
Office of Chairman Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Christopher.libertelli@fcc.gov](mailto:Christopher.libertelli@fcc.gov)

Lisa Zaina  
Senior Legal Advisor  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Lisa.zaina@fcc.gov](mailto:Lisa.zaina@fcc.gov)

Daniel Gonzalez  
Senior Legal Advisor  
Office of Commissioner Kevin Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Daniel.gonzalez@fcc.gov](mailto:Daniel.gonzalez@fcc.gov)

Uzoma C. Onyeije  
Legal Advisor  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Uzoma.onyeije@fcc.gov](mailto:Uzoma.onyeije@fcc.gov)

Michelle M. Carey  
Division Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Michelle.carey@fcc.gov](mailto:Michelle.carey@fcc.gov)

Jessica Rosenworcel  
Competition and Universal Service  
Legal Advisor  
Office of Commissioner Michael Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Jessica.rosenwo@fcc.gov](mailto:Jessica.rosenwo@fcc.gov)

John Muleta  
Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[John.muleta@fcc.gov](mailto:John.muleta@fcc.gov)

William Maher  
Bureau Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[William.maher@fcc.gov](mailto:William.maher@fcc.gov)

Qualex International  
445 12<sup>th</sup> Street, S.W.  
Room CY-B402  
Washington, DC 20554  
[Qualexint@aol.com](mailto:Qualexint@aol.com)

Michael Altschul  
Christopher Day  
Cellular Telecommunications and  
Internet Association  
1250 Connecticut Avenue, NW  
Suite 800  
Washington, DC 20036

Leonard Kennedy  
Kent Nakamura  
Nextel Communications, Inc.  
2001 Edmund Halley Drive  
Reston, VA 20191

Laura H. Phillips  
Drinker Biddle & Reath, LLP  
1500 K Street, N.W.  
Suite 1100  
Washington, DC 20005

Thomas Sugrue  
Harold Salters  
Daniel Menser  
T-Mobile USA, Inc.  
401 9<sup>th</sup> Street, N.W.  
Suite 550  
Washington, DC 20004

Ruth Milkman  
Gil M. Strober  
T-Mobile  
Lawler, Metzger & Milkman, LLP  
Suite 802  
2001 K Street, N.W.  
Washington, DC 20006

Douglas I. Brandon  
AT&T Wireless Services, Inc.  
1150 Connecticut Avenue, N.W/  
Suite 400  
Washington, DC, 20036

Howard J. Simmons  
Sarah F. Leibman  
Mintz, Levin, Cohn, Ferris, Glovsky and  
Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Washington, DC, 20004

David P. McClure  
US Internet Industry Association  
815 Connecticut Avenue, NW  
Suite 620  
Washington, DC 20006

Dave Baker  
Vice President  
Law and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street, Level A  
Atlanta, GA 30309

Howard J. Symons  
Sara F. Leibman  
Michael Pryor  
AT&T Wireless Services, Inc.  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W., Suite 900  
Washington, DC 20004

Mark J. O'Connor  
Linda L. Kent  
EarthLink, Inc.  
Lampert & O'Connor, P.C.  
11750 K Street, N.W., Suite 600  
Washington, DC 20006

Paul J. Feldman  
Raymond J. Quianzon  
Surewest  
Fletcher, Heald & Hildreth, P.L.C.  
1300 North Seventeenth Street  
Arlington, VA 22209

Jeffrey S. Linder  
Joshua S. Turner  
Wiley Rein & Fielding LLP  
1776 K Street, N.W.  
Washington, DC 20006

Robert S. Tongren  
Ohio Consumers' Counsel  
10 West Broad Street  
Suite 1800  
Columbus, OH 43215

/s/ Ulises R. Pin  
Ulises R. Pin